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Nos. 97 and 98.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BALTIMORE & OHIO RAILROAD CO., ET AL., *Petitioners*,

vs.

BOSTON & MAINE RAILROAD, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

PETITION FOR REHEARING

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The Daily Record Co., Baltimore, 3, Md.

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MAY IT PLEASE THE COURT:

On May 20, 1963, the judgment below was affirmed *per curiam* by an equally divided Court. Mr. Justice White took no part in the consideration or decision of this case.

Petitioners respectfully request that the Court grant a rehearing in these cases.

The reason is easily stated. At the present time there is great confusion as to the proper standards for the Interstate Commerce Commission to employ in determining the lawfulness of freight rates on export-import traffic moving by rail through highly competitive ports. The decision of the lower court, which now stands affirmed, only adds to the confusion in at least two respects.

First. Before a proper relationship of freight rates is determined, the reasonableness of the rates is ordinarily first established. In the present case, a prior finding of reasonableness by the Commission was unnecessary because the Commission rejected the relationship which the proposed rates created. When, however, the lower court later upset the Commission's relationship findings, it suddenly became necessary to determine the reasonableness of the rates. *This the lower court did itself.* It performed the administrative function and evaluated the evidence, without remand to the Commission. In fact, the lower court found reasonableness despite strong inferences in the Commission's report that, had it been necessary for the Commission to deal with the subject, the proposed rates at New York would have been found non-compensatory (R. 3793-7).

Second. The lower court undertook to resolve a bitter controversy between two groups of carriers over rate relationships by merely finding that one group of carriers could exercise its right to compete with lower rates. The lower court did not even mention, let alone deny, the right of the other group of carriers (Petitioners in No. 97) to do likewise, and it completely ignored the fact that this other group of carriers had specifically exercised the right. Nor did the lower court refer to the Commission's finding that "approval of respondents' [appellees'] proposed rates would require alternate approval of protestants' [appellants'] proposed rates" (R. 3806).

Obviously, when rate relationships of the kind here involved are put in issue, only a tribunal with a national responsibility is qualified to arrive at decisions protecting the public interest. The Commission meets this qualification, but when its decisions are challenged on principle, only the Supreme Court should decide. Not only the parties but the public at large are entitled to such opinions by this Court.

Lower courts are in hopeless conflict.

In *Baltimore & Ohio Railroad Company v. United States*, 151 F. Supp. 258 (1957, D. Md.) relative distances were important in dealing with relationships of this kind, and in *New York Central R. Co. v. United States*, 207 F. Supp. 483 (1962, S.D. N.Y.), Judge Friendly remanded a similar controversy to the Commission to develop, among other things, the extent to which relative distances were supported by relative costs of transportation. Here, in the instant case, while recognizing that relative distances "might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads," the lower court completely disregards the Commission's finding that "the higher costs of service to and from those [the northern tier] ports, are firmly established" and the extensive evidence to be found in this record in support of that finding (R. 4004, 3806, 3854).

The Commission and the lower federal courts are thus left without any authoritative guidance in dealing with cases of this character. The situation is particularly acute because the Court has not really dealt with the subject since Congress amended the Interstate Commerce Act in 1935 to give ports the right to complain of undue preference and prejudice — an amendment that was the direct consequence of this Court's decision in *Texas & Pacific Ry. v. United States*, 289 U.S. 627 (1933).

At the very least, the cases should be remanded to the Commission, with direction to perform its proper administrative function of determining the compensatory character and reasonableness of the proposed rates. This would insure that an administrative function is performed by an agency of the federal government that has a direct, national responsibility and special qualifications for the task.

Conclusion

A rehearing should be granted with the hope that it would enable a majority opinion of the Court to be handed down. An alternative is a remand of this controversy to the Interstate Commerce Commission with direction to determine the reasonableness of the proposed rates.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Jervis Langdon, Jr. and William L. Marbury, counsel for the petitioners in No. 97 and No. 98, do hereby certify that the foregoing petition is presented in good faith and not for delay.

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